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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHESTER FOLAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant who submits to a stipulated bench trial which is the functional equivalent of a guilty plea should be admonished by the District Court as to the constitutional rights he is waiving?

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CHESTER FOLAK,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Chester Folak, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on April 26, 1985.

OPINION BELOW

The opinion below, *United States v. Chester Folak, et al.*, Docket Nos. 83-3290, 84-1119 and 84-1497, is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 26, 1985. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The petitioner, Chester Folak, was employed as a deputy sheriff of Cook County, Illinois. He was assigned to the Levy Department, and was responsible for the execution of judgments and Illinois Department of Revenue seizure warrants directed against delinquent taxpayers and judgment debtors in Cook County.

In July, 1982, Mr. Folak, along with two other persons, was charged in a forty-seven count indictment with mail fraud and extortion (18 U.S.C., 1341 and 1951). The indictment alleged that Mr. Folak accepted money and other things of value from judgment debtors in return for not properly executing tax liens and judgments.

At all times, Mr. Folak has maintained his innocence. Through his attorney, he entered a plea of not guilty at his arraignment, and has persisted in his denial of guilt ever since.

Mr. Folak's trial was set for February 28, 1983, after the case had been continued several times. On that date, Mr. Folak appeared in court with his attorney and the following proceedings ensued:

"THE COURT: Good afternoon.

MR. STETLER: That's right. I'm sorry. It has been a long day.

MR. CUNNIFF: Good afternoon, Judge. Kenneth Cunniff on behalf of Marvin Grulke who is present before your Honor.

MR. BLOOM: Marvin Bloom on behalf of Chester Folak.

MR. STEINBACK: Good afternoon, your Honor. Jeff Steinback on behalf of Hy Schmidt, who is present in court.

THE COURT: I believe this case was up to see what, if any, trial was going to be necessary.

MR. STETLER: Your Honor, I think we have it resolved. I think everybody is here and ready to go forward. I anticipated taking approximately five minutes. We simply have to tender to the Court a copy of the waiver of jury by defendant Folak. The other defendants have already appeared in court and been advised of their rights and waived their right to a jury in this matter.

We have agreed on a rather lengthy stipulation that we will be submitting to the Court along with two volumes of exhibits that I have here with me now. It is simply a matter of tendering to the Court the stipulation that the defendants and the government have agreed on and signed and doing the jury waiver.

THE COURT: Do the parties want to file memoranda on the merits or how do the defendants want to present their case?

MR. CUNNIFF: Judge, with the exception of the legal issue which I raised before your Honor before trial, which had to do with the magistrate's findings, which your Honor previously ruled on, which briefs were previously filed on, I would have no further briefs to file.

THE COURT: How about the other defendants?

MR. BLOOM: Judge, with respect to Mr. Folak there would be no additional briefs.

MR STEINBACK: That is our position also, your Honor.

MR. STETLER: Judge, when you see the stipulation you will find out that it is rather lengthy and detailed. I think it is fairly straight forward and factual. We don't intend to submit anything in addition. It is fairly comprehensive.

THE COURT: All right. Do you have the jury waiver there?

MR. STETLER: Yes, your Honor.

THE COURT: Which is Mr. Folak?

MR. BLOOM: This is Mr. Folak (indicating).

THE COURT: You are Mr. Folak? This is your signature on the waiver?

DEFENDANT FOLAK: Yes, sir.

THE COURT: So, you are giving up your constitutional right to a trial by jury by submitting this case on stipulations, is that correct?

DEFENDANT FOLAK: Yes, sir.

THE COURT: This, I take it, is your signature, Mr. Bloom?

MR. BLOOM: That is correct, your Honor.

THE COURT: Are you satisfied with Mr. Bloom's recommendation and representation of you in this case?

DEFENDANT FOLAK: Yes, sir.

THE COURT: So, all three of you defendants have now decided to let the case be decided without a jury and on the basis of the stipulation that has been entered into, is that correct?

MR. CUNNIFF: That is correct, your Honor.

MR. STEINBACK: Yes, your Honor.

DEFENDANT FOLAK: Yes.

THE COURT: Mr. Grulke, I didn't get your assent.

DEFENDANT GRULKE: Yes, your Honor.

THE COURT: I guess it was Mr. Schmidt I didn't get.

DEFENDANT SCHMIDT: Yes, your Honor.

THE COURT: All right, fine. I will proceed to, as soon as the record is filed, do something with respect to the merits.

MR. STETLER: Your Honor, I am sure it has been covered by your previous questions of Defendant Folak but just so it is clear and consistent with the form waiver of trial by jury we have, I wonder if the defendant can acknowledge in open court that he understands the matters enumerated in the form, in other words that he has a right to have a jury decide if he is guilty or not guilty; that a jury is composed of twelve members of the community; that he may participate with his attorney in the selection of jurors; that the verdict of the jury must be unanimous and that, if a jury is waived, you alone will be deciding his guilt or innocence. I realize that it is covered—

THE COURT: Do you understand that, Mr. Folak?

DEFENDANT FOLAK: Yes.

THE COURT: Mr. Schmidt?

DEFENDANT SCHMIDT: Yes, sir.

THE COURT: Mr. Grulke?

DEFENDANT GRULKE: Yes.

THE COURT: This is not a plea of guilty, you know. After all, they have already assented to this.

MR. STETLER: Right. I do understand that, Judge.

THE COURT: Fine. Well, all right, I will take care of it as soon as—you do have the record there now and the stipulation?

MR. STETLER: Yes, Judge. I have got three volumes here. The first volume is the original stipulation which has been executed by myself and Mr. Syfert, all three defendants and all three of their counsel. I put in two extra copies for the Court in case you wanted to take notes on it.

I have also two copies of the exhibit list and an extra copy of the indictment. So, when you see the stipulation, it is geared to counts and you can compare the indictment with the factual stipulation. So, I have included that in the first volume.

The second and third volumes contain all the trial exhibits which are referred to in the factual stipulation.

At the time I would move to admit all of the government exhibits which are enumerated in the stipulation and, as agreed to in the stipulation, are authentic and admissible for the purposes of this stipulation.

THE COURT: That is agreed to by the stipulation?

MR. CUNNIFF: There is no objection, your Honor.

MR. STEINBACK: That was our understanding, your Honor.

MR. BLOOM: That is correct, your Honor." (Tr. 2-6)

The entire transcript of the day's proceeding consists of seven pages.* (See Appendix "B", attached hereto) On November 1, 1983, the District Court found Mr. Folak guilty on twenty-eight of thirty-nine counts. Mr. Folak then moved the District Court for leave to withdraw his

* The remaining two defendants also submitted to a "stipulated" bench trial simultaneously with Mr. Folak.

stipulation alleging, in essence, that he was unaware of the import of the stipulation and the fact that he was waiving his various constitutional rights in the process. These motions were denied without a hearing. (Vol. I, pp. 78-85; Tr. 2-5, 2-13-84)

Mr. Folak was subsequently sentenced to a 12 year prison term and fined $17,000. (Tr. 22-25, 3-12-84) In his appeal to the Seventh Circuit Court of Appeals, Mr. Folak asserted that his stipulation to the government's version of the facts was the "functional equivalent" of a guilty plea, and that he was, therefore, not properly admonished as to the constitutional rights he was waiving. He further maintained that his purported waiver of these rights could not rest upon a silent record.

On April 26, 1985, the appellate court rejected Mr. Folak's contentions and affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

I.

A DEFENDANT WHO SUBMITS TO A STIPULATED BENCH TRIAL, IN WHICH THE GOVERNMENT'S ENTIRE CASE IS INTRODUCED BY WAY OF A WRITTEN DOCUMENT, SHOULD BE PROPERLY ADMONISHED AS TO THE CONSEQUENCES OF HIS ACTIONS AND THE CONSTITUTIONAL RIGHTS HE IS WAIVING.

The petitioner, Chester Folak, has at all times maintained his innocence of the charges contained in the indictment. The method utilized in the District Court to resolve the issues of fact and credibility as to the allegations

against Folak consisted entirely of the Court's examination of a written document prepared by the government prosecutor and introduced into evidence in the form of a written stipulation. The stipulation itself stated ". . . that, if called to testify at trial, the testimony of government witnesses and the Government Exhibits enumerated herein, would *establish* the following: . . ." (Emphasis supplied)

There was no trial of any sort.* No witnesses were called into court; no testimony subject to cross examination was received; no defense evidence was subpoenaed or presented and, of course, no arguments by counsel were offered in support of an acquittal.

Based entirely upon this stipulation,** Mr. Folak was convicted of multiple counts of mail fraud and extortion, and he was subsequently subjected to a very harsh penalty of 12 years in prison and a $17,000 fine.

Mr. Folak's submission to the stipulation was, in fact, the "functional equivalent" of a guilty plea. The close similarity between a guilty plea and a stipulation to the government's proof was recognized by this Court in *Boykin v. Alabama*, 396 U.S. 238, 243-244 (1949) where this Court observed: "A plea of guilty is more than a voluntary confession made in open court, it also serves as a *stipulation* that no proof by the prosecution need be advanced." (Emphasis supplied)

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* There does not appear to be any statutory basis for a stipulated bench trial in criminal cases. The practice seems to have developed over the years with the tacit approval of reviewing courts. (See, *United States v. Strother*, 578 F.2d 397, 404-405 (D.C. Cir. 1978).

** The stipulation itself is a 50 page document containing a summary of the testimony of each government witness as it relates to specific counts in the indictment.

Despite the fact that Mr. Folak surrendered just about all his due process rights by submitting to the stipulation, he was never admonished as to this fact. The trial judge merely inquired of Mr. Folak as to whether he understood he was waiving a jury, and whether he was satisfied with his lawyer. (Tr. 2-6, 2-28-83)

Mr. Folak was not told he was waiving his right to confront witnesses (*Bruton v. United States*, 391 U.S. 123 (1968)), to present evidence in his own behalf (*Washington v. Texas*, 388 U.S. 14 (1967)), or the opportunity through counsel to argue for an acquittal in open court (*Herring v. New York*, 422 U.S. 853 (1975)).

Since, we maintain, Mr. Folak's stipulation constituted a waiver of his constitutional due process rights, as well as serving to relieve the prosecution of its constitutional duty to present proof beyond a reasonable doubt (*In Re Winship*, 397 U.S. 358 (1970)), it was incumbent upon the trial court to carefully admonish Mr. Folak as to the rights he was waiving. Therefore, a procedure akin to a Rule 11* colloquy should have taken place between the District Court and Mr. Folak.

There are, admittedly, some distinctions between a straight guilty plea and a stipulated bench trial,** but the

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* Rule 11 of the Federal Rules of Criminal Procedure governs the procedure to be followed in District Courts for the acceptance of guilty pleas. The relevant provisions of Rule 11 are reproduced in the Appendix to this Petition as Appendix "C".

** Some states have held that a stipulated bench trial, being the functional equivalent of a guilty plea, must be accompanied by an express on-the-record waiver (as in a guilty plea) by the defendant of the rights he is waiving. See, for example, *A.E.K. v. Florida*, 432 So.2d 720 (Fla. App. 1983), *Sutton v. State*, 424 A.2d 755, 759 n.2 (Md. App. 1981) and *People v. Ries*, 329 N.E.2d 243 (Ill. App. 1975).

essential fact remains that in both instances the defendant is waiving his rights to a trial of any sort.

In the present case Mr. Folak, despite being adamant in his persistence of innocence (Tr. Vol. I, pp. 78-85), never received a trial in open court, never confronted a single witness and never was given the opportunity to argue in open court for an acquittal. The waiver of these rights should have been accompanied by an on-the-record colloquy between the Court and the defendant to ensure that the defendant was aware of these rights and knowingly waived them. Surely our motions of fundamental fairness and due process of law require no less.

A. The Decision Of The Seventh Circuit Conflicts With The Decisions In Other Circuits As To The Necessity Of Properly Admonishing A Defendant Prior To Utilization Of A "Stipulated Bench Trial" Procedure.

The Seventh Circuit's opinion acknowledges that the District of Columbia Circuit requires Rule 11 inquiries where the stipulated bench trial constitutes a waiver of trial on all issues. (See Slip opinion, p. 10; *United States v. Lawson*, 682 F.2d 1012, 1015 (D.C. Cir. 1982))

It would appear, however, that other Circuits as well mandate Rule 11 type admonishments before a defendant is allowed to submit to a stipulated bench trial. In *United States v. Harding*, 491 F.2d 697, 698 (10th Cir. 1974), an obscenity prosecution, the Court stated: "As we view it, the stipulation to obscenity is in effect a *limited plea of guilty* and there is no reason why this should not be permissible if it is done *freely* and *voluntarily*." (Emphasis supplied)

Moreover, in those instances where stipulated bench trial procedures have been approved, appellate courts have relied upon trial records which have contained ex-

tensive admonishments of the defendants as to their understanding of the procecure employed and their voluntary waiver of rights. See, for example, *United States v. Tobin*, 701 F.2d 1108, 1109-1110 (4th Cir. 1983), *Witherspoon v. United States*, 633 F.2d 1247, 1249-1250 (6th Cir. 1980), *United States v. Stalder*, 696 F.2d 59, 60-61 (8th Cir. 1982) and *United States v. Miller*, 588 F.2d 1256, 1264 (9th Cir. 1978). Such a procedure was not followed with respect to Mr. Folak. It must be presumed that the circuits cited above would require a far more complete record as to Mr. Folak's knowing and voluntary waiver of rights before approving of Mr. Folak's stipulated bench trial. Thus the Seventh Circuit's standard for stipulated bench trials must be viewed as far more relaxed in terms of requiring the record to show that the defendant both understands what he is doing and that his actions are, in fact, voluntary.

B. The Seventh Circuit's Decision Incorrectly Holds That The Petitioner Can Waive Constitutional Rights Upon A Silent Record.

Since the landmark decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938), it has been the law of the land that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights . . .", and that the record must show "an intentional relinquishment or abandonment of a known right or privilege." (304 U.S. at 464)

Thus the record must show on its face that: (a) the defendant was *aware* of the rights he was waiving, and (b) voluntarily and intentionally waived those rights.

Neither prong of that test has been met under the facts of the instant case. There can be no doubt that the peti-

tioner waived important constitutional rights by submitting to a stipulated bench trial.

The Seventh Circuit's decision implicitly acknowledges that Mr. Folak waived his various constitutional rights in the District Court. But the decision then relies upon a process of implication and conjecture to conclude that the petitioner voluntarily and knowingly waived those rights. The decision states: ". . . the clear implication of Folak's answers to the court is that he knew that the stipulations would constitute the entire evidence in the case. Moreover, Folak was a deputy sheriff, and we may assume that he therefore had some familiarity with the judicial process." (Slip opinion, p. 11)

Thus the Seventh Circuit states that by way of "implication"—"we may assume" Folak knew what he was doing in the District Court. It is difficult to square this approach with the time-honored standard enunciated in *Johnson v. Zerbst, supra,* as well as the precise holding in *Brookhart v. Janis,* 384 U.S. 1, 7-8 (1965), where upon facts resembling those in the case at bar, this Court concluded that *Brookhart* did not knowingly waive his right to confront and cross examine witnesses.*

Not only did the petitioner in the present case waive his rights to confront and cross examine witnesses, present evidence and offer in-court argument, but he was per-

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* As noted above, in those Circuits where stipulated bench trials have been approved, there is extensive on-the-record evidence of the defendant's knowing and voluntary waivers. (See, *supra,* pp. 10-11) This stands in sharp contrast to the meager record in the instant case which has compelled the Seventh Circuit to go beyond the record in assuming that Mr. Folak was familiar with the judicial process and presumably, therefore, voluntarily waived his rights.

mitted to do so without a showing that such actions on his part were free of duress, mistake or misapprehension of law or fact. The Seventh Circuit has chosen to imply and assume that the Petitioner waived these rights freely and intelligently, contrary to the admonition that courts must indulge every reasonable presumption against such a waiver.

The Seventh Circuit's decision represents a substantial step backwards from the notion that a constitutional right cannot be waived upon a silent record. The petitioner's insistence upon his day in court is a right that should be denied only upon the clearest of records.* For this reason, we submit, the Seventh Circuit erred in concluding upon a silent record, that the petitioner knowingly and voluntarily waived his constitutional rights to an adversarial trial.

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* It should be noted that the petitioner was taken totally by surprise when the District Court convicted him. He apparently was laboring under the mistaken belief that he would be given the opportunity to present evidence in his own behalf. Upon learning of the findings of guilty, Mr. Folak presented his affidavit and offer of proof contesting the accuracy of the stipulation. Mr. Folak also asserted that at no time did his attorney advise him as to the consequences of his stipulation. (Vol. I, pp. 78-85)

CONCLUSION

Petitioner, Chester Folak, respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit. He further requests that this Court vacate his convictions and sentences.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOS. 83-3290, 84-1119, 84-1497

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HYMAN SCHMIDT, MARVIN GENE GRULKE, CHESTER FOLAK,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 467—**Thomas R. McMillen**, *Judge*.

ARGUED NOVEMBER 5, 1984—DECIDED APRIL 26, 1985

Before ESCHBACH and POSNER, *Circuit Judges*, and WISDOM, *Senior Circuit Judge*.*

ESCHBACH, *Circuit Judge*. Hyman Schmidt and Chester Folak, former deputies with the Cook County Sheriff's Department, and Marvin Grulke, a self-employed public-auction liquidator, were involved in a multi-faceted scheme to extort money from judgment and tax debtors at the expense of judgment creditors and the State of Illinois. For their parts in the scheme, they were convicted of multiple counts of mail fraud, 18 U.S.C. § 1341, and extortion, 18 U.S.C. § 1951. On appeal, Schmidt challenges the sufficiency of the evidence supporting several of his extortion convictions, and the length of his sentence. Folak challenges the denial of his post-trial motion to withdraw the stipulations upon which

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* The Honorable John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

the court's findings of guilt were based. Grulke claims that he was promised immunity from prosecution, and that he never should have been indicted. We affirm the convictions.

I.

Defendants Chester Folak and Hyman Schmidt were employed as Cook County Sheriff's Deputies, and were assigned to the Levy Department. The Levy Department is responsible for the enforcement of all seizure warrants and writs of execution directed against delinquent taxpayers and judgment debtors owning property in Cook County, Illinois.[1] As deputies, the defendants were instructed to levy upon the personal property of the debtors pursuant to the writ of execution or seizure warrant. They were required to make proper service of the warrant or writ upon the debtor, inventory the debtor's property and safeguard it pending an auction, post proper notices of public auction of the property, collect the monies owed by the debtor or conduct a public auction of his property, and remit the proceeds to the Sheriff's Office for disbursement in satisfaction of the writ or warrant. The deputies were also responsible for issuing accurate bills of sale for the debtor's property to successful bidders. Defendant Marvin Grulke was self-employed as a liquidator engaged in the business of purchasing assets at public auction for the purpose of resale. Folak and Schmidt, aided by Grulke, did not, however, faithfully execute their duties as Sheriff's Deputies. Instead, they embarked on a scheme to use their positions to line their pockets at the expense of judgment creditors, the State of Illinois, and victimized debtors. The scheme had a number of facets.

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[1] A seizure warrant is a command issued by the Illinois Department of Revenue directing the Sheriff to levy upon the property of a delinquent taxpayer to satisfy a tax liability owed to the State of Illinois. A writ of execution is an order entered by the Cook County Circuit Court following a civil lawsuit directing the Sheriff to levy upon the property of a private debtor to satisfy a judgment held by a private creditor.

At times, the defendants rigged auction sales by setting a pre-arranged price at which the debtor would be allowed to retain his assets. The defendants would then retain a portion of the price, fail to conduct a public auction, and arrange for the return of the debtor's assets to the debtor. At times, the defendants looted assets seized from debtors while these assets were in the defendants' care and custody. Defendants sometimes accepted money or other property for their own use in order to allow a debtor to continue to operate his business.

Defendants were charged in a 47-count indictment with violations of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1951 (extortion). Before trial, defendant Grulke moved to suppress statements and evidence against him, arguing that he had cooperated with the government in reliance on the prosecutor's promises of immunity. A hearing on the motion to suppress was held before a magistrate, and the district court substantially adopted the magistrate's findings that the prosecutors had not at any time offered Grulke immunity, nor had they given Grulke any reason to believe that he would be immunized in return for his cooperation. The case was then heard by the district court judge. All of the evidence, including the government's exhibits, was stipulated to by the government and the defendants.[2]

Grulke, who was charged in 15 counts of the indictment, was found guilty of three counts of mail fraud and three counts of extortion[3] and acquitted of nine other counts. Folak was found guilty on nineteen counts of mail fraud and nine counts of extortion and acquitted of eleven other counts. Schmidt was found guilty on three counts of

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[2] The court granted the government's motion to dismiss paragraph 12 of Count One, and Counts Twelve and Thirty-two, for lack of evidence.

[3] Grulke at times impersonated a deputy sheriff in order to carry out the extortionate scheme.

mail fraud and five counts of extortion and acquitted of eleven other counts.[4]

II.

A.

Hyman Schmidt contends that the evidence was insufficient to support his convictions on Counts 22, 25, and 36 for extortion. He also argues that the district court abused its discretion in sentencing him to serve seven years in prison. We examine each contention in turn.

1. Extortion Convictions

Relying on *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972), Schmidt argues that the conduct described in the stipulations concerning Counts 25 and 36 constitutes, at most, bribery and not extortion. According to Schmidt,

> while bribery [is] a voluntary payment made in order to exert undue influence upon the performance of an official duty, extortion involves payment in return for something *to which the payor is already legally entitled.*

Id. at 72 (quoting *Hornstein v. Paramount Pictures*, 22 Misc. 2d 966, 37 N.Y.S.2d 404 (1942)) (emphasis in original). Since the debtors involved in these counts were not legally entitled to the benefits they received, Schmidt reasons, the conduct described cannot be extortion.

It is unclear from the *Addonizio* opinion whether the court accepted the distinction pressed by Schmidt here,[5]

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[4] The defendants received the following sentences:

Schmidt—7 years in prison and $7,000 fine;
Folak—17 years in prison and $17,000 fine;
Grulke—5 years in prison and $5,000 fine.

[5] The quotation from *Addonizio* reproduced above upon which defendant relies occurred in the context of an historical dis-

(Footnote continued on following page)

see id. at 73. It is absolutely clear, however, that this court has repeatedly rejected it. *See, e.g., United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *United States v. Price*, 617 F.2d 455, 457 (7th Cir. 1979); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

Schmidt next argues that his convictions for extortion in Counts 25 and 36 must be reversed because there is no evidence that he coerced or induced the payments that he received; he argues, in effect, that the payments were merely gratuities. Schmidt relies heavily on *United States v. O'Grady*, 742 F.2d 682, 692-93 (2d Cir. 1984) (en banc), in which the court found erroneous a jury instruction on extortion that "omitted an essential element of the offense, *to wit*, a finding that [the defendant] misused his office to obtain benefits not due him . . . ." The court explained that

> to prove the crime of extortion under color of public office the government must show that the public official *induced* the benefits received. The fact of public office supplies the potential threat or force necessary, but it is the wrongful use of that office to induce benefits that constitutes the crime.

Id. at 688 (footnote omitted; emphasis in original). While the *O'Grady* court would not require the government to "prove that the public official demanded or directly solicited the benefits received, or that he offered a specific *quid pro quo*," it would require that the government "show that

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[5] *continued*

cussion. The *Addonizio* court explained that the definition of extortion in 18 U.S.C. § 1951 had its genesis in the New York Penal Code.

Judge Aldisert, dissenting in *United States v. Cerilli*, 603 F.2d 415, 426 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), argued that extortion under color of official right as defined in 18 U.S.C. § 1951 must be construed as narrowly as extortion under the New York Penal Code. His view did not gain acceptance in the Third Circuit, nor any other circuit.

the power of public office was misused in such a way as to induce the giving of benefits." *Id* at 688-89. The court recognized that several other courts of appeals including this one, *see e.g., United States v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), had specifically rejected the notion that proof of inducement by the public official is necessary. Nevertheless, the court "[did] not read those decisions to permit a conviction for extortion under color of official right absent evidence that the public official had misused his office to obtain the benefits." *O'Grady*, 742 F.2d at 689.

> Our prior cases clearly hold that
>
> [i]t is settled law in this Circuit . . . that in a . . . prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortionate payment . . . . The government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position.

Hedman, supra, 630 F.2d at 1195. *See also United States v. Braasch*, 505 F.2d 139, 151 n.8 (7th Cir. 1974) ("coercive" extortion not only type outlawed by 18 U.S.C. § 1951; also illegal to accept payoffs "under color of official right," and that offense does not require proof of coercion), *cert. denied*, 421 U.S. 910 (1975).

However, we need not disagree with *O'Grady*'s holding that some "misuse" of office is required in order to affirm Schmidt's convictions for extortion. The evidence under Count 25 shows that Schmidt accepted money from a tavern owner on three occasions and, in return, allowed the tavern to remain open instead of closing it and executing a writ of execution. The district court could have found from evidence that Schmidt twice returned to the tavern to collect additional payments, that Schmidt solicited the payments he received.[6] The evidence under

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[6] We note that even the *O'Grady* court realized that

> inducement can take many forms, some more subtle than

(Footnote continued on following page)

Count 36 shows that Folak suggested to the owner of an automobile parts company upon whom he had served a seizure warrant that he would allow the owner to buy back the business for a payment to Folak, Schmidt, and a third person. The owner paid Schmidt $500, and no auction was ever held. The evidence was more than sufficient to show that Schmidt did not passively accept a "gratuity," but, along with Folak, actively solicited an illegal payment.[7]

Schmidt also claims that the evidence of extortion under Count 22 is insufficient, contending that there is no evidence that he obtained payments wrongfully. Schmidt argues that the evidence only shows that he collected money in the course of his employment to satisfy a writ of execution. The defendant apparently overlooks the fact that, as a reviewing court, we must assess the evidence in the light most favorable to the government. That evidence shows that Schmidt visited the premises of B&L Beauty Supplies on July 7, 1979, in connection with several seizure warrants. Schmidt told B&L's owner, Robert Hayes, that he would close the business unless Hayes "came up with some cash." Hayes gave Schmidt approximately $100 so that Schmidt would leave B&L open. Schmidt paid two more visits to B&L, and was given $100 each time. When Schmidt returned on September 18,

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[6] *continued*

> others. Proof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a *quid pro quo* would suffice as would other circumstantial evidence tending to show that the public official induced the benefits. If the evidence established that [the defendant] clearly created the impression, not by words but by deeds [that gifts were required for favorable treatment he] could not escape conviction.

742 F.2d at 691-92.

[7] Schmidt argues that the evidence of inducement is also insufficient in Count 22. As in Count 25, the evidence shows repeated visits by Schmidt to the debtor, and repeated acceptance of money to leave the business open.

however, Hayes had no more money. Schmidt called a liquidator, who arranged to have B&L's locks changed, and told Hayes he could buy back B&L if he brought $500 to the liquidator the next day. Hayes borrowed the money from an employee and delivered it to the liquidator, who issued a bill of sale in the employee's name. Schmidt reported to the Sheriff's Department a sale of B&L's assets at public auction on September 18, 1979, to Ace Auctioneers for $300.

Schmidt claims that since the amount he received from Hayes over the course of the summer equals the amount he remitted to the Sheriff's Department, no inference can be drawn that he collected any money unlawfully. However, Schmidt simply ignores a stipulation that "[n]one of the approximately $300 [collected over the summer] was remitted to the Sheriff's Department by Schmidt." The trier of fact could easily have found that Schmidt obtained the $300 he eventually remitted to the Sheriff from the liquidator, and that he took and retained the other $300 as payment for allowing Hayes to keep his business open. The evidence is sufficient to support Schmidt's conviction.

2. Sentencing

Schmidt, who was 71 years old at the time of sentencing, complains that his seven-year prison sentence is too harsh. Schmidt's sentence is well within statutory limits,[8] and our review of such a sentence is extremely circumscribed. We may not reduce or change a sentence imposed within statutory limits "unless the trial court relied on improper or unreliable information in exercising

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[8] At oral argument, Schmidt's attorney informed us that under the statutes, Schmidt could have been sentenced to a maximum of 115 years imprisonment. We also note that because of his age, Schmidt was sentenced under the provisions of 18 U.S.C. § 4205(b)(1), and therefore becomes eligible for parole after serving two years and 120 days.

its discretion or failed to exercise any discretion at all in imposing the sentence." *United States v. Ely*, 719 F.2d 902, 906 (7th Cir. 1983) (quoting *United States v. Fleming*, 671 F.2d 1002, 1003 (7th Cir. 1982)), *cert. denied*, 104 S. Ct. 1313 (1984).

Schmidt claims that the court sentenced him to a substantial period of incarceration in order to send a message to Schmidt's unindicted superiors at the Sheriff's Department. The record does not support this assertion. The government attorney, indeed, stated that a substantial sentence was justified partly by the need to deter similar conduct by other officials. Judge McMillen said nothing about sending a message to higher-ups; rather, he stated that the sentence was justified because the defendant was guilty of "very serious crimes that undermine the integrity of not only [Schmidt's] office but of the judicial system that has to enforce these various writs." Nor can we agree with Schmidt that the judge failed to consider any of the various mitigating factors present (such as Schmidt's age, military service, and lack of a previous criminal record). The judge did consider these factors explicitly, on the record, but expressly determined that they were outweighed by the aggravated nature of the offenses. None of the other complaints Schmidt raises about the sentencing process has merit. Accordingly, we find that the district court did not abuse its discretion in sentencing Schmidt to seven years imprisonment.

B.

As noted in Part I, *supra*, the defendants submitted the case to the district court for decision solely on the basis of extensive stipulations of fact. Folak was charged in 39 counts of the indictment and convicted on 28. He now argues that the district court erred in denying his post-trial motion to withdraw the stipulations. While conceding that Fed. R. Crim. P. 11 does not apply, Folak contends that the stipulations were the functional equivalents of guilty pleas, and that the district court should

therefore not have accepted them without conducting an inquiry substantially similar to that required by Rule 11.[9]

We have difficulty accepting Folak's argument for several reasons. First, the factual predicate for Folak's argument (that is, that the stipulations amounted to guilty pleas) is doubtful. The stipulations were simple narratives, and largely testimonial. They stated facts to which the government's witnesses would have testified had they been called, with no stipulation as to the truthfulness of the testimony. There were no stipulations as to intent. The district court was merely asked to decide the case on the basis of an agreed statement of facts; the legal inferences remained to be drawn. Defendant was, in fact, acquitted of eleven of the counts against him.

Moreover, almost every federal court that has considered the argument advanced here by Folak has rejected it outright. *See, e.g., United States v. Robertson*, 698 F.2d 703, 709 (5th Cir. 1983) and cases cited therein. The District of Columbia Circuit would apparently require Rule 11 inquiries if "by stipulation or otherwise a defendant has effectively admitted his guilt and waived trial on all issues." *United States v. Lawson*, 682 F.2d 1012, 1015 (D.C. Cir. 1982); *United States v. Strother*, 578 F.2d 397 (D.C. Cir. 1978). As demonstrated above, however, this is not such a case. *Cf. Lawson, supra.*

The defendant counters, however, that in agreeing to submission of the case on the basis of stipulations, he waived several constitutional rights, and he contends that we should not accept such a waiver on the basis of a silent record. Folak admits, as he must, that the record is not entirely silent. Folak acknowledged, in open court, his

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[9] The government argues that the merits of Folak's post-trial motion to withdraw the stipulations are not properly before us, contending that the motion was an untimely motion under Fed. R. Crim. P. 33. We note that there was no impediment to the district court's jurisdiction to consider the motion, as the motion could properly be considered under 28 U.S.C. § 2255. *See, e.g., United States v. Brown*, 413 F.2d 878 (9th Cir. 1969), *cert. denied*, 397 U.S. 947 (1970).

signature on a jury waiver form. The following colloquy ensued:

The Court: So, you are giving up your constitutional right to a trial by jury by submitting this case on stipulations, is that correct?

Defendant Folak: Yes, sir.

* * *

The Court: Are you satisfied with [your attorney's] recommendation and representation of you in this case?

Defendant Folak: Yes, sir.

The Court: So all of you defendants have now decided to let the case be decided without a jury and *on the basis of the stipulation that has been entered into*, is that correct?

* * *

Defendant Folak: Yes.

Transcript, Feb. 28, 1983, pp. 3-4 (emphasis added).

While defendant vigorously contends that he was never told there would be no trial, that he would not confront witnesses, and that he would not be given the opportunity to present evidence on his own behalf, the clear implication of Folak's answers to the court is that he knew that the stipulations would constitute the entire evidence in the case. Moreover, Folak was a deputy sheriff, and we may assume that he therefore had some familiarity with the judicial process. Defendant's protestations that he was misled by his attorney as to the import of the stipulations, and the rights he was waiving, strain credibility. Folak stated in open court that he was satisfied with his attorney's recommendations, and did not express his surprise that there was to be no formal trial until months after the decision in his case. Finally, we

note, as did the court in *Robertson*, *supra*, 698 F.2d at 708, that there is less reason to suspect the voluntariness of various waivers of trial rights in the context of a not guilty plea, than where the defendant has actually entered a plea of guilty because there is no reason to suspect that the plea has resulted from coercion or cajolery by the prosecution. We therefore reject Folak's argument that the district court was required to conduct a more extensive inquiry in this case, and we affirm the denial of Folak's motion to withdraw the stipulations.

C.

Grulke moved before trial to dismiss the indictment on the ground that he had been promised immunity from prosecution in exchange for his cooperation in the investigation leading to the indictment. The government contested Grulke's claim, and the district court referred the matter to a magistrate for a hearing. The magistrate concluded that there was no credible evidence that Grulke had been given either an express or an implied promise that he would not be prosecuted. Grulke filed exceptions to the magistrate's report, and the district court overruled the objections.

The defendant first contends that the finding that no promises of immunity were made is clearly erroneous. We disagree. Defendant relies on a letter from an Assistant United States Attorney to defendant's counsel which stated that on at least one occasion after March 16, 1981, defendant was told by an FBI agent that "if he told the truth and fully cooperated with the investigation he would not get into any trouble." Defendant characterizes this letter as uncontradicted evidence that he was promised immunity. Defendant ignores the tremendous amount of evidence, credited by the magistrate and the district court, that he was told by the same agent before March 13 that no one but the United States Attorney could promise him immunity, and was also told specifically that neither the FBI nor its agents had the authority to determine who would be subject to prosecution. Further, at a meeting on

March 13 between Grulke, the FBI agent, and Assistant United States Attorney Stetler, Grulke was told by Stetler that the U.S. Attorney would make no promises or commitments, and that if charges were brought against him and he were convicted, the court would be informed of his cooperation at the time of sentencing. Even Grulke admitted that he was told at this meeting that he could not be given immunity (although he testified he was told that he would not be prosecuted "from this day forward" if he cooperated). The district court's finding that Grulke was not promised immunity is not clearly erroneous.[10]

Both the magistrate and the district court concluded further that any reliance on statements made by the FBI agent was unreasonable in light of the repeated admonitions by both the agent and the government attorney that only the U.S. Attorney could grant immunity. Grulke invites us to infer from the extent of his cooperation that he must have relied on some sort of promise. We decline this invitation to reweigh the evidence before the magis-

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[10] The district court expressly adopted the following findings of the magistrate:

1. That the FBI Agent's testimony that he gave Grulke no promise of immunity was corroborated;
2. That no reasonable basis existed for the defendant's purported reliance on the agent's statements for believing that he had been promised immunity;
3. That no promise of immunity was given by government prosecutors.

The district court did not adopt the magistrate's finding that no credible evidence existed that any express or implied promise was given defendant; however, in the decision overruling defendant's exceptions to the magistrate's report, the judge noted that the report was premised on the finding that no credible evidence of promises exists. It is evident from the decision that the judge accepted this finding as the factual predicate for the rest of the magistrate's findings and recommendations, and believed that it was supported by substantial evidence.

trate, especially in light of the magistrate's credibility determinations against Grulke.[11]

Finally, Grulke argues that the statements of the FBI agent and the Assistant United States Attorney created "confusion" over Grulke's legal status, and that this confusion was sufficient to warrant dismissal of the indictment. We disagree. The magistrate found that Grulke knew and understood that only the United States Attorney could promise him immunity. Thus, no statement by the FBI agent could have been perceived by defendant as a promise of immunity. Moreover, the magistrate specifically found that Grulke's testimony that he was told by the Assistant United States Attorney on March 13 that he would not be prosecuted "from this day forward" was unbelievable. Again, Grulke's argument amounts to an invitation to ignore the credibility findings made below. This we decline to do. *See United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979).

Grulke's motion to dismiss the indictment was properly denied.

III.

For the reasons stated above, the judgments of conviction are affirmed.

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[11] Grulke contends that the government failed to deny his reliance on promises in its "pleadings," and therefore his reliance should be deemed admitted. There were no pleadings. Grulke filed a motion to dismiss the indictment and the government responded to the motion, joining Grulke's request for a hearing. The government was not required to deny all the allegations made by Grulke in his motion. The government's response to a defendant's pre-trial motion is not the equivalent of an answer to a complaint in a civil action.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago Illinois 60604

April 26, 1985.

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 83-3290, 84-1119, 84-1497 v.

HYMAN SCHMIDT, MARVIN GENE GRULKE, and CHESTER FOLAK,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 467—**Thomas R. McMillen**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

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* The Honorable John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, is sitting by designation.

APPENDIX "B"

[1]* UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CHESTER FOLAK, MARVIN GRULKE,
and HYMAN SCHMIDT,

Defendants.

Docket No. 82 CR 467
Chicago, Illinois
February 28, 1983, 2:00 O'Clock P.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE THOMAS R. McMILLEN

APPEARANCES:

For the Plaintiff:

MR. DAVID STETLER, AUSA
MR. KEITH SYFERT, AUSA
(Hon. Dan K. Webb
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604)

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* Numbers in brackets refer to the pagination of the Official Court Reporter's transcript of proceedings.

For the Defendants:

MR. MARVIN BLOOM
134 North LaSalle Street
Chicago, Illinois 60602

MR. KENNETH L. CUNNIFF
29 South LaSalle Street
Chicago, Illinois 60603

MR. JEFFREY B. STEINBACK
(Messrs. Levenfeld, Eisenberg,
Janger, Glassberg, Genson & Lippitz
33 West Monroe Street, Suite 2100
Chicago, Illinois 60603)

Court Reporter:

JAMES W. CHEEK
UNITED STATES DISTRICT COURT
219 S. Dearborn St.—Rm. 2502-A
Chicago, Illinois 60604

[2] THE CLERK: 82 CR 467, United States vs. Folak, Grulke and Schmidt; status report.

MR. STETLER: Good morning, Judge. Dave Stetler and Keith Syfert on behalf of the government.

THE COURT: Good afternoon.

MR. STETLER: That's right. I'm sorry. It has been a long day.

MR. CUNNIFF: Good afternoon, Judge. Kenneth Cunniff on behalf of Marvin Grulke who is present before your Honor.

MR. BLOOM: Marvin Bloom on behalf of Chester Folak.

MR. STEINBACK: Good afternoon, your Honor. Jeff Steinback on behalf of Hy Schmidt, who is present in court.

THE COURT: I believe this case was up to see what, if any, trial was going to be necessary.

MR. STETLER: Your Honor, I think we have it resolved. I think everybody is here and ready to go for-

ward. I anticipated taking approximately five minutes. We simply have to tender to the Court a copy of the waiver of jury by defendant Folak. The other defendants have already appeared in court and been advised of their rights and waived their right to a jury in this matter.

We have agreed on a rather lengthy stipulation that we will be submitting to the Court along with two volumes of exhibits that I have here with me now. It is simply a matter of tendering to the Court the stipulation that the defendants and the government have agreed on and signed and doing the jury waiver.

[3] THE COURT: Do the parties want to file memoranda on the merits or how do the defendants want to present their case?

MR. CUNNIFF: Judge, with the exception of the legal issue which I raised before your Honor before trial, which had to do with the magistrate's findings, which your Honor previously ruled on, which briefs were previously filed on, I would have no further briefs to file.

THE COURT: How about the other defendants?

MR. BLOOM: Judge, with respect to Mr. Folak there would be no additional briefs.

MR. STEINBACK: That is our position also, your Honor.

MR. STETLER: Judge, when you see the stipulation you will find out that it is rather lengthy and detailed. I think it is fairly straight forward and factual. We don't intend to submit anything in addition. It is fairly comprehensive.

THE COURT: All right. Do you have the jury waiver there?

MR. STETLER: Yes, your Honor.

THE COURT: Which is Mr. Folak?

MR. BLOOM: This is Mr. Folak (indicating).

THE COURT: You are Mr. Folak? This is your signature on the waiver?

DEFENDANT FOLAK: Yes, sir.

THE COURT: So, you are giving up your constitutional right to a trial by jury by submitting this case on stipulations, is that correct?

[4] DEFENDANT FOLAK: Yes, sir.

THE COURT: This, I take it, is your signature, Mr. Bloom?

MR. BLOOM: That is correct, your Honor.

THE COURT: Are you satisfied with Mr. Bloom's recommendation and representation of you in this case?

DEFENDANT FOLAK: Yes, sir.

THE COURT: So, all three of you defendants have now decided to let the case be decided without a jury and on the basis of the stipulation that has been entered into, is tnat correct?

MR. CUNNIFF: That is correct, your Honor.

MR. STEINBACK: Yes, your Honor.

DEFENDANT FOLAK: Yes.

THE COURT: Mr. Grulke, I didn't get your assent.

DEFENDANT GRULKE: Yes, your Honor.

THE COURT: I guess it was Mr. Schmidt I didn't get.

DEFENDANT SCHMIDT: Yes, your Honor.

THE COURT: All right, fine. I will proceed to, as soon as the record is filed, do something with respect to the merits.

MR. STETLER: Your Honor, I am sure it has been covered by your previous questions of Defendant Folak but just so it is clear and consistent with the form waiver of trial by jury we have, I wonder if the defendant can acknowledge in open court that [5] he understands the matters enumerated in the form, in other words that he has a right to have a jury decide if he is guilty or not guilty; that a jury is composed of twelve members of the community; that he may participate with his attorney in the selection of jurors; that the verdict of the jury must

be unanimous and that, if a jury is waived, you alone will be deciding his guilt or innocence. I realize that it is covered—

THE COURT: Do you understand that, Mr. Folak?

DEFENDANT FOLAK: Yes.

THE COURT: Mr. Schmidt?

DEFENDANT SCHMIDT: Yes, sir.

THE COURT: Mr. Grulke?

DEFENDANT GRULKE: Yes.

THE COURT: This is not a plea of guilty, you know. After all, they have already assented to this.

MR. STETLER: Right. I do understand that, Judge.

THE COURT: Fine. Well, all right, I will take care of it as soon as—you do have the record there now and the stipulation?

MR. STETLER: Yes, Judge. I have got three volumes here. The first volume is the original stipulation which has been executed by myself and Mr. Syfert, all three defendants and all three of their counsel. I put in two extra copies for the Court in case you wanted to take notes on it.

I have also two copies of the exhibit list and an extra [6] copy of the indictment. So, when you see the stipulation, it is geared to counts and you can compare the indictment with the factual stipulation. So, I have included that in the first volume.

The second and third volumes contain all the trial exhibits which are referred to in the factual stipulation.

At the time I would move to admit all of the government exhibits which are enumerated in the stipulation and, as agreed to in the stipulation, are authentic and admissible for the purposes of this stipulation.

THE COURT: That is agreed to by the stipulation?

MR. CUNNIFF: There is no objection, your Honor.

MR. STEINBACK: That was our understanding, your Honor.

MR. BLOOM: That is correct, your Honor.

THE COURT: All those exhibits, then, are admitted.

Now, does the government want to file any kind of an argument or memorandum?

MR. STETLER: Judge, I don't plan to. If the Court has questions when the Court rules, perhaps the Court could ask questions but I think it is fairly straightforward and detailed. I think if I went over it for your Honor now I would maybe just be wasting the Court's time.

THE COURT: I will notify the parties if I think there should be any kind of an oral argument or brief or anything of that sort before I make my decision.

MR. CUNNIFF: Just for the record, since your Honor [7] gave me leave to renew my motions filed pretrial with regard to the motion to dismiss the indictment, I would move at this time, since we are tendering the stipulation on the trial facts, to renew my motion once again to dismiss the indictment.

THE COURT: I will take that under advisement, also.

MR. CUNNIFF: Thank you, your Honor.

THE COURT: Next case.

MR. STEINBACK: Thank you, good afternoon, your Honor.

MR. STETLER: Thank you, Judge.

(Which were all the proceedings had on said date.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ JAMES W. CHEEK
Court Reporter

1-6-84
Date

APPENDIX "C"

RULES OF CRIMINAL PROCEDURE

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 11. Pleas

* * *

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded,

that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

* * *